IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

PROLINE MATERIALS, INC., a Texas corporation, **Plaintiff,** **v.** **PROLINE PRODUCTS, LLC, an Oklahoma limited liability company,** **Defendant.**	**Case No.** CIV-13-156-C

COMPLAINT

COMES NOW, the Plaintiff PROLINE MATERIALS, INC., a Texas corporation ("Plaintiff") and for its causes of action against PROLINE PRODUCTS, LLC, an Oklahoma limited liability company ("Defendant") states and alleges as follows:

1. Plaintiff is a validly existing corporation legally organized and doing business in Texas. Plaintiff's principal place of business is in Hempstead, Texas.

2. Upon information and belief, Defendant is a validly existing limited liability company organized and doing business in Oklahoma. Defendant's principal place of business is in Guthrie, Oklahoma.

3. Based on the states of organization and the principal offices of Plaintiff and Defendant, complete diversity exists between the two parties. Further, the amount in controversy relevant to this action exceeds $75,000, exclusive of interest and costs.

JURISDICTION AND VENUE

4. Based on the foregoing, jurisdiction is proper in Federal District Court based on the requirements of 28 U.S.C. § 1332.

5. Defendant is subject to personal jurisdiction in this Court, being registered to do business in Oklahoma, as well as having substantial personal contacts within the State of Oklahoma and within the geographical bounds of this judicial district.

6. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391.

STATEMENT OF FACTS

7. Plaintiff is in the asphalt industry, and sells various asphalt products to both the State of Texas Department of Transportation and private businesses that engage in road construction, maintenance, and repair.

8. Defendant produces and markets "cold-patch" asphalt, which is commonly used to repair cracks in roads and potholes. The term "cold-patch" is used based on the material not needing to maintain a high temperature in order to have a consistency that is conducive to spreading on a road. Defendant's cold-patch product is called "ProLine," and is a polymer modified cold asphalt.[1]

9. Defendant has sold asphalt products to Plaintiff for at least eight (8) years, and the parties have entered into various agreements regarding respective rights to sell and market the ProLine brand of cold-patch asphalt.

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[1] *See* Defendant's website at www.prolinecoldasphalt.com.

10. In 2004, Plaintiff and Defendant entered into a formal agreement, titled "PROLINE™ Distributorship Agreement FOR BULK" (the "2004 Agreement"). The 2004 Agreement is attached hereto as Exhibit "1."

11. The 2004 Agreement gave Plaintiff an exclusive distributorship territory in parts of Texas, which allowed Plaintiff (and Plaintiff only) to market and distribute ProLine cold-patch asphalt to existing and potential customers in that defined area. It provided for an initial term of ten (10) years, with consecutive renewal terms of three (3) years per renewal unless otherwise terminated. *See*, Exhibit "1," Section 2. The 2004 Agreement further specified payment terms regarding the purchase of ProLine from Defendant at specific prices. *See* Exhibit "1," Section 7.

12. On March 18, 2011, Plaintiff and Defendant entered into another agreement (the "2011 Agreement"). The 2011 Agreement consists of two (2) paragraphs, and is attached hereto as Exhibit "2."

13. The 2011 Agreement provides that Plaintiff is to have "the sole right to distribute ProLine® additive blend to its customers in Texas…"[2] *See* Exhibit "2." It further provides that "[f]or the sole right to distribute ProLine® additives and ProLine® bagged asphalt in Texas by [Plaintiff] shall be granted by [Defendant] of Oklahoma for the sum of $500,000.00 (Five Hundred Thousand Dollars Exactly)." *Id.* Plaintiff paid Five Hundred Thousand Dollars ($500,000.00) to Defendant in order to be the sole distributor of Defendant's products in the State of Texas.

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[2] Though Defendant begins using the registered trademark symbol ("®") referring to its products in the 2011 Agreement, it is unknown whether Defendant owns any registered trademarks.

14. Regarding payment terms, the 2011 Agreement states that "[Plaintiff] will pay raw material cost only along with a blending fee estimated to be $1000.00 per blended order. All other cost will be recovered in the royalty fees as set forth." *Id.*

15. Though the 2011 Agreement states that Plaintiff is to pay only raw material cost, along with a blending fee of $1,000.00 and royalty costs of either $0.25 or $0.40 per gallon (depending on the time of purchase), Defendant has consistently charged Plaintiff more than called for in the 2011 Agreement, and thus has breached the 2011 Agreement. Plaintiff demanded that Defendant cure said breach, and provide it with a true accounting that justifies what it has been charged. Defendant has not, to date, provided such an accounting and has not cured its breach.

16. As mentioned above, Plaintiff has paid a significant amount of money to Defendant in order to be the exclusive distributor of ProLine in Texas. Defendant has further breached the 2011 Agreement by intruding into Plaintiff's territory covered by the 2011 Agreement, and marketing ProLine to Plaintiff's customers in Texas.

17. Upon information and belief, Defendant has marketed and sold ProLine to at least one of Plaintiff's customers. It is believed that Defendant has attempted, and continues to attempt, to solicit business from Plaintiff's customers by marketing ProLine products to those customers.

18. When improperly marketing ProLine sales to Plaintiff's customers, Defendant has been spreading various falsehoods to those customers and specifically saying that Plaintiff "won't be in Texas much longer," that Plaintiff is a terrible company to do business with, and that Plaintiff cannot sell asphalt products to anyone. Such

falsehoods have disparaged Plaintiff's name and caused the loss of at least one (and perhaps many) of Plaintiff's customers.

19. Plaintiff has made a demand to Defendant to either cease marketing its products in Texas in contravention of the 2011 Agreement, or to return the $500,000.00 payment Plaintiff made to Defendant in order to obtain the sole and exclusive right to distribute ProLine in the State of Texas. Defendant has failed or refuses to respond to this demand.

Count I - Breach of Contract (Overpayment)

20. Plaintiff hereby incorporates all prior allegations of this Complaint.

21. The 2011 Agreement governs the business relationship between Plaintiff and Defendant, and provides that Plaintiff is to be charged raw materials cost only, plus a blending fee, plus a modest royalty fee.

22. Upon information and belief, Defendant has overcharged Plaintiff by improperly inflating the actual cost of its raw materials and charging royalties over what was provided for in the 2011 Agreement. Such actions constitute a breach of the 2011 Agreement, to which Plaintiff is entitled to both an accounting of the actual raw materials cost paid by Defendant for each load of product purchased by Plaintiff since the 2011 Agreement was signed, and to reimbursement of any overages charged to Plaintiff above Defendant's raw materials cost, including any overages that were charged to Plaintiff based on Defendant's failure to charge Plaintiff the correct royalty fee.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just. Plaintiff further prays for an Order of this Court directing Defendant to provide an accounting of raw material costs for each load of product purchased by Plaintiff since the 2011 Agreement was signed.

Count II - Breach of Contract (Sole Distributorship)

23. Plaintiff hereby incorporates all prior allegations of this Complaint.

24. The 2011 Agreement provides that Plaintiff is to have "the sole right to distribute ProLine® additive blend to its customers in Texas…" Exhibit "2."

25. Defendant has breached the 2011 Agreement by marketing its products for sale within the State of Texas.

26. Such marketing by Defendant has caused Plaintiff economic loss, to which it is entitled to recovery from Plaintiff.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just.

Count III - Unjust Enrichment

27. Plaintiff hereby incorporates all prior allegations of this Complaint.

28. Plaintiff paid Defendant $500,000.00 for the sole right to distribute Defendant's products in the State of Texas. Such payment was made on or around March 18, 2011.

29. Defendant has directly marketed its products in Texas to Plaintiff's customers, and continues to solicit business from Plaintiff's customers. Such action is in direct contrast to Plaintiff's business interests, and constitutes a breach of the 2011 Agreement.

30. Defendant refuses to return the $500,000.00 paid to it by Plaintiff for the sole right to distribute Plaintiff's product in the State of Texas, despite demand to do so.

31. "Unjust enrichment is a condition which results from the failure of a party to make restitution in circumstances where it is inequitable; i.e. the party has money in its hands that, in equity and good conscience, it should not be allowed to retain." *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24 ¶ 18, 164 P.3d 1028. Such a situation is surely present here, where Defendant has intruded upon an exclusive distributorship right that was granted less than two (2) years ago, but opts to retain the $500,000.00 that Plaintiff paid for that right.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant for Five Hundred Thousand and NO/100 Dollars ($500,000.00), representing the amount Plaintiff paid to Defendant for the sole right to distribute ProLine in the State of Texas, and against Defendant for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just.

Count IV - Breach of the Covenant of Good Faith and Fair Dealing

32. Plaintiff hereby incorporates all prior allegations of this Complaint.

33. The Oklahoma Supreme Court recognizes that each party to a contract has a duty not to take any action that will destroy the opposite party's rights under the contract. *See Western Natural Gas Co. v. Cities Service Gas Co.*, 1972 OK 76, ¶ 42, 507 P.2d 1236 ("[I]n every contract there exists an implied covenant of good faith and fair dealings, and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's rights to receive the fruits of the contract." (quoting 17A C.J.S. *Contracts* § 328)).

34. Defendant breached its duty to refrain from acting to destroy or injure Plaintiff's rights under the 2011 Agreement by knowingly overcharging Plaintiff for raw material costs and royalties, in contravention of the agreement between the parties.

35. Defendant further breached its duty to refrain from acting to destroy or injure Plaintiff's rights under the 2011 Agreement by knowingly marketing and selling ProLine to Plaintiff's customers in the State of Texas, despite the fact that Plaintiff held the sole and exclusive right to sell ProLine in Texas per the terms of the 2011 Agreement.

36. Defendant's actions have injured Plaintiff's right to receive the fruits of the 2011 Agreement, as Defendant has overcharged Plaintiff and has violated Plaintiff's contractual rights under the 2011 Agreement.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just.

Count V - Interference With Economic Relations

37. Plaintiff hereby incorporates all prior allegations of this Complaint.

38. Defendant intentionally reached out to at least one of Plaintiff's known customers and, in derogation of Plaintiff's sole right to distribute ProLine in the State of Texas, marketed and sold ProLine products to that customer.

39. Such acts were calculated to cause damages or business losses to Plaintiff, and such damages occurred when at least one of Plaintiff's customers bought product from Defendant.

40. Plaintiff has a reasonable expectation of profits from its current customers, which reasonable expectation has been interfered with by Defendant unlawfully, and Defendant interferes further, in contravention of its contractual agreement with Plaintiff, by marketing and selling asphalt products within the State of Texas.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just.

Count VI - Injurious Falsehood/Slander

41. Plaintiff hereby incorporates all prior allegations of this Complaint.

42. When improperly marketing ProLine sales to Plaintiff's customers, Defendant has been spreading various falsehoods to those customers and specifically saying that Plaintiff "won't be in Texas much longer," that Plaintiff is a terrible company to do business with, and that Plaintiff cannot sell asphalt products to anyone. Such

falsehoods have disparaged Plaintiff's name and caused the loss of at least one (and perhaps many) of Plaintiff's customers.

43. Defendant's statements are blatantly untrue, and have misled Plaintiff's customers. In fact, at least one of Plaintiff's (former) customers no longer buys asphalt products from Plaintiff because of Defendant's false statements.

44. Defendant's statements were made with the intent to harm the interests of Plaintiff, and Defendant either recognized or should have recognized that its statements had the effect of harming Plaintiff's interests.

45. Defendant knew that the statements made were false, or acted in reckless disregard of the statements' truth or falsity.

46. As a result of Defendant's false statements, Plaintiff has been damaged through loss of profits and disparagement of business reputation.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just.

Count VII - Injunction

47. Plaintiff hereby incorporates all prior allegations of this Complaint.

48. The 2011 Agreement provides that Plaintiff is to have the sole and exclusive right to market and sell ProLine asphalt in the State of Texas. Thus, any party other than Plaintiff may not lawfully market and/or sell ProLine products within that territory.

49. Defendant has breached the 2011 Agreement by marketing and selling ProLine asphalt in the State of Texas, having personal knowledge that Plaintiff purchased the sole and exclusive right to do so.

50. The actions of Defendant have caused, and are causing, irreparable harm to Plaintiff that cannot be adequately compensated by money damages.

51. Unless and until Defendant returns the lump sum payment of Five Hundred Thousand and NO/100 Dollars ($500,000.00), which Plaintiff paid to Defendant in order to purchase the sole and exclusive right to market and sell ProLine asphalt in the State of Texas, Defendant should be enjoined from making contact with any asphalt producer in the State of Texas with the purpose of attempting to market, sell, or distribute any ProLine product.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendants, and prays that this Court issue an injunction prohibiting Defendant from making contact with any asphalt producer in the State of Texas with the purpose of attempting to market, sell, or distribute any ProLine product. Plaintiff further prays for all of its direct, consequential, and special damages, including without limitation, economic loss, for pre-judgment and post-judgment interest as allowed by law, costs, and for such other and further relief as this Court deems just.

Demand for Jury Trial

Plaintiff hereby demands a jury trial of all claims triable by a jury.

Dated: February 13, 2013

Respectfully submitted,

By: s/Blake Lawrence
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